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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 52.

SALLIE FIELD SCOTT, ELIZA MADISON SCOTT, HARRIET B. JONES, ET ALS., APPELLANTS,

vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, ET ALS., APPELLEES.

BRIEF OF COUNSEL FOR APPELLEES.

EDWARD R. GUNBY,
HORATIO BISBEE,
Of Counsel for Appellees.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 13469

(18,966.)

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vs.

LIZZIE W. CAREW, W. W. HAMPTON, E. R. GUNBY, M. G. GIBBONS, M. M. NELSON, E. C. BEACH, S. Y. FINLEY, and GEORGE W. HALL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF EDWARD R. GUNBY AND HORATIO BISBEE, SOLICITORS FOR APPELLEES.

It appears by the bill of complaint filed in this case that the heirs of Robert J. Hackley, who died in 1845, claim the lands in controversy on the ground that their ancestor

acquired certain rights by virtue of a settlement of the said Robert J. Hackley on said lands in 1823, and that as a legal result of said settlement the said rights have descended to his heirs, the said Robert J. Hackley, during his lifetime, and his heirs and representatives since his death, having done everything to perfect the rights which descended to them.

There is no dispute about the legal title to this land, it appearing from the record that, after a contest which lasted for twelve years and went through the Land Department of the United States from the local office to the Secretary of the Interior, which was twice or three times reviewed and finally adjudicated by the Secretary of the Interior, the title of the United States, which was never disputed, passed by patent to the defendants and, as far as the rights of the complainants and the Government were concerned, the controversy was ended and the matter settled in favor of the defendants.

The record here shows that the Secretary of the Interior, Mr. Hoke Smith, decided adversely, as a matter of fact and as a matter of law, to the claims of the complainants, and subsequently to this decision, a petition having been filed by Beelbie *et al.*, claiming that the patents to these defendants were, by reason of false and fraudulent testimony and misrepresentations, illegally issued, the Government of the United States, through its duly recognized authority, the Secretary of the Interior, Cornelius N. Bliss, reviewed the entire case and refused on the part of the Government to bring a suit to annul the patents, giving as his reason for said decision that the Government was satisfied that the alleged frauds could not be proved.

The sole ground, then, upon which these complainants have any standing in a court of equity to ask its intervention for the purpose of obtaining any rights which they may seem to have is that the Secretary of the Interior, in his decision, came to an erroneous conclusion as to the application of the

law and its construction under and by virtue of which the Hackley heirs claim that they were entitled to the first right to pre-empt the land in controversy.

No fraud is charged in this bill; no subversion or perversion of facts or testimony; no illegal action on the part of the defendants; no information given to the Secretary of the Interior or the local land office which misled the legal officers and resulted in the obtaining of a patent for the present owners; no testimony which tended to influence the decision of the land officers improperly, and we therefore have the plain, bold, legal proposition that the Secretary of the Interior having erred in his construction of the law, and the patent by reason of such error having been issued to the wrong people, they, being the legal owners by reason of the patent, shall be deemed and held by this court to hold the land in trust for the benefit of the people who should have received the patent, the appellants in this case, and that therefore they, the appellees, be required to convey by proper deeds the lands so held by them.

The appellants were, on the face of their bill, at the time of the bringing of this suit, barred by the statute of limitations, and the appellants, if they ever had any rights, lost them by laches.

Statute of Limitations.

Sub. IV of section 1294 of the Revised Statutes of Florida reads as follows: "Within four (4) years an action for any article charged in a store account, and any action for relief not specifically provided for in this chapter." Sub. V of said section reads in part as follows: "Within three (3) years an action for relief on the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the fact constituting the fraud."

Our contention is that both the four-year and three-year clauses of the statute of limitations above quoted are a complete bar to this action. The bill shows on its face that patent was issued to defendant in July, 1896; the bill was not filed until December, 1900, or about four and one-half years after the patent issued.

A statute of limitations made expressly applicable to a suit in equity or barring a suit in equity is of comparatively modern origin both in England and America. At a more distant period there was no statute of limitations barring a suit in equity, but courts of equity, acting in analogy to the statute barring an action at law, invented and applied the doctrine of laches and stale claims.

Decided cases arising under these modern statutes of limitations are abundant to establish that both the three-year and four-year clauses of our statutes are an absolute bar to the suit. The said four-year clause was carried into the Revised Statutes from section XII of an act of 1872 by the Florida legislature, which section provides that "An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action accrued." The supreme court of Florida held that this section applied to an equity case and was a complete bar to any suit in equity not brought within four years.

Branch *vs.* Cole, 18th Fla., 368. Speaking on the same subject in Brown *vs.* Brown, 17th Fla., 623, at the bottom of the page, the court said that "If the case were not within the three-year clause it would be within the four-year clause of the statute," and in 24th Fla., 1, and 28th Fla., 55, the court held that "The statute of limitations applies to equity cases as well as to suits at law;" and the Supreme Court, in the case of The United States *vs.* Daniel, 12th Peters, p. 56, ruled that "In case a statute of limitations was applicable to an equity case, the court acted in obedience to the statute and not in analogy to it," whereas if there is no remedy at law and there is no statute of limitations that bars a suit in

equity, then the court acts in analogy to it. Courts of equity apply the bar in a case before it, if it would be the duty of the court at law to apply such a bar in the event there had been a remedy at law and a statute of limitations applicable thereto. This rule has no application to the case in hand, because there is a statute of limitations applicable to the case and bars the remedy in equity and there was no remedy at law. The case of Cleveland Insurance Company *vs.* Reid, 24th How., 284–287, is one of the earliest cases on the subject. There the statute of Wisconsin read substantially like the above four-year clause in Florida, and the court ruled that the statute of the State of Wisconsin was obligatory upon the Federal court. Other cases will be cited later on.

The Three-year Clause of Limitations.

This clause is applicable on the following grounds: The plaintiffs claim defendants have illegally obtained title to land that in equity should be conveyed to them, and the defendants refuse to convey. This is a statement of a legal fraud within the meaning of the statute of limitations. They knew of the alleged fraud the moment it was committed; they were parties to the litigation in the Interior Department, which the court judicially knows is conducted on formal pleadings, and they knew that the decision of that Department went against them; that a patent was ordered in 1894 and actually issued in July, 1896. We think there can be no question in reason, and certainly none on the authorities, that if A obtains a patent to land which equitably belongs to B and takes possession of and appropriates it and its rent and profits to his own use, he has committed an actual fraud. If A accomplishes such a result, not knowing that the land belongs to B, he has committed a legal fraud pure and simple. Second vol. of Wood on Limitations, sec. 274: Where the acts which constitute the fraud as

alleged in the bill were open and public acts, the statute commences to run from the time the defendant acquired the title. Norris *vs.* Haggin, 136 U. S., 386–392. In that case defendant acquired title under foreclosure of mortgage. *Ib.*, p. 391. In that case plaintiff at one time owned the legal title, and his remedy at law by ejectment would have been complete if he had seasonably resorted to it. In the case of St. Paul S. & T. F. R. R. Co. *vs.* Sage, the same doctrine was maintained. That case is on all fours with the case at bar. The land involved had been granted by the General Government to the State of Minnesota. Two rival railroad companies claimed title to it. The title was conveyed to one company and the other brought a bill in equity to compel the defendant to convey it. The clause in the Minnesota statute reads as follows: "6th. An action for relief on the ground of fraud. Cause of action in such case is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Which is the exact language of the three-year clause of the Florida statute with the exception of the period of time. The circuit court of appeals held that the obtaining of the legal title to the land which equitably belongs to the defendants was a fraud within the meaning of the statute of limitations, and the suit, not having been brought within six years, was barred by the statute. (See op'n of the court, 1st C. C. A., p. 263.) This court would be bound to follow that decision unless some fault can be discovered in reasoning, which we think impossible. Of course, there can be no question that the proceedings in the Interior Department were public and notorious, and the plaintiffs, being parties to such proceedings, knew of the alleged fraud upon their rights when the decision was made against them in 1894, and also in the patent issued July, 1896.

The case of Teall *vs.* Schroder, 158th U. S., 172, was one like this at bar to compel the defendant to convey to the plaintiff the legal title. Suit was brought in California.

Justice Field, speaking for the court on page 178, quotes the statute of limitations as follows: "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued," and adds: "This section applies specifically to action for equitable relief." "Other sections of the act provide for the limitations of actions at law."

"Sub. IV., sec. 338 of the Code of Civil Procedure is as follows:" "An action for relief on the ground of fraud or mistake must be brought within four years after the cause of action accrues. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." In that, as in the case at bar, the facts showing the statute had run appeared on the face of the bill and were demurred to on that ground. The bill was dismissed because barred by the statute, and on appeal the decree of the court below was affirmed. (See op'ns, pp. 178, 179, 180.)

Case of Baker *vs.* Cummings, 169 U. S., 189, is fatal to the bill on demurrer.

The Doctrine of Laches.

A delay of over four years, during which the property involved has, in part, been sold, presumably to purchasers without notice of any plaintiff's claim, is fatal to a suit to set aside a judicial sale (156th U. S., 527–536). Indeed, the decision of the Interior Department was notice they had no claim. If fatal to set aside a judicial sale it is equally fatal to set aside a sale by the United States, and in 169th U. S., 189, the court held that the bill was not only barred by the statute of limitations of three years, but by laches (*Ib.*, 206). On the doctrine of laches we also cite 155th U. S., page 550; 158th U. S., 216–416; 160th U. S., 186; 156th U. S., 618.

In the case at bar the proceedings in the land office were

public, notorious acts, and the opinions and records of that office establish that plaintiffs were parties to all the proceedings resulting in a patent to the defendants. It was six years after the decision of that office was finally rendered against them before they brought this suit, and nearly four years and a half after patent issued.

Plaintiffs were bound to know that when the patent issued the title, by relation, dated from the initiatory filings in the Land Office, which were in 1882. They were also bound to know the law that as soon as the pre-emption claimants' rights or homestead claimants' rights were sustained and the purchase-money paid the property was the property of such claimants, subject to taxation and subject to contracts of sale, of improvements and incumbrances. They also knew that the lands in controversy were substantially a part of the city of Tampa, subject to rapid rise in value and to frequent alienations by deeds and other contracts, and that they would not remain in a state of nature.

Independent of the statute of limitations, if there ever was a cause to which the doctrine of laches or State claims is applicable, this is certainly one (Knox *vs.* Spratt, 23 Fla., 65–67).

Excuses for Delay.

The bill sets up, page 21, that one Beilby and others made an effort to get the Government to set aside the patent, and we suppose this averment was intended as an excuse for delay. Plainly it was not only no excuse, but reprehensible conduct on the plaintiffs' part. They knew perfectly well what the Supreme Court has repeatedly decided, that the Government never takes action to vacate a patent to land unless in a case where, if the patent is vacated, the land again becomes a part of the public domain. They knew that the Government never takes action to vacate a patent in the interest of and for the benefit of a private claimant.

Plaintiffs' willingness, then, that the title should be taken away from the patentees by action of the Government without any benefit resulting to them does not commend them to a court of equity. It is evidence of the harboring of a spirit of malice against the patentees for defeating plaintiffs in the Land Department.

An excuse for delay in bringing a suit which a court of equity recognizes consists of facts showing obstacles in the way of an early suit that could not, with reasonable diligence, have been overcome at an earlier date (12th vol. Pl. & Pr., 834–836).

Plaintiffs also suggest in their bill, as an excuse for a delay of their suit, the fact that the plaintiffs resided in the three States of California, New York, and Virginia, and to obtain concert of action by plaintiffs required time. But the answer to this suggestion is that the record shows the plaintiffs had already had concert of action before the Land Department in prosecuting this claim. Therefore the presumption is that each knew the address of the others, and in this day of railroads, telephones, and telegraphs one month would have been ample time to determine the question of concert of action. Besides, the absence of concert of action was not any legal impediment to a suit. Either one or more could have sued for their share of the property without joining the other claimants. Therefore what the bill states as excuses for delay would be dignified by calling them pretexts.

The suit is purely an experimental one, and not the less so because the plaintiffs have been able to employ reputable counsel to represent them. Its foundation is a mist of absurdities and uncertainties.

The plaintiffs, when the Land Department decided to award a patent to the patentees, to wit, in 1894, could have maintained a bill to enjoin such patentees from selling or incumbering the lands, and thus the patentees and third parties would have been notified of plaintiffs' alleged rights and

abstained from investing in the lands or improving the same (1st C. C. A., 269–270).

In that case counsel for complainants conceded that the innocent grantees from the patentees stand in a better position than the patentees themselves (*Ib.*, p. 260).

Contention of Plaintiffs.

The contention of plaintiffs that section 1288 of the Revised Statutes of Florida applies to this case is entitled to no weight. That section provides for cases where the action of defense is founded on legal title to real property and applies to an action of ejectment, and in such case the statute of limitations is seven years. As abundantly shown by authorities cited, this suit in equity is not an action founded upon title to real property, but to obtain a legal title on equitable grounds.

Another point: It may be contended that some of the plaintiffs are under disabilities, being minors or married women. The bill does not show that at the time the right of action accrued any of the plaintiffs were under disabilities, and the saving clause in the statute of limitations applies only to the person to whom the title first accrued, and when the statute once begins to run it continues to run (Wade *vs.* Doyle, 17th Fla., 522).

This is a familiar rule. But section 1294, sub. IV–V, already discussed, contains no exception on account of any disability, and it is a familiar rule that, where the statute of limitations makes no exception in favor of any person, either minor or married woman, the court of equity cannot engraft any exception upon the statute. We repeat, the bill does not show that any of the minors were in existence or that any of the married women were married women either at the time the patent was ordered, in 1894, or issued, in 1896. But a complete answer to any contention that any

of the plaintiffs were under disabilities is that the only section of the Revised Statutes of Florida providing for any disability is section 1292, and that applies specifically to persons entitled to commence an action for the recovery of real property or to make an entry or defense founded on the title to real property. In such cases there is a disability in favor of minors, insane and imprisoned persons, and none in favor of married women. This section, like section 1288, applies only to actions at law to recover real property based on legal title. Both sections are expressed in language so clear that there is no room for doubt on that subject. Under sections 1287 and 1288, if the action is founded on title to real property, it is not barred until the lapse of seven years; and section 1292 provides that if at the time the title to real property accrues the party to whom it accrues is within the age of twenty-one years, insane, or in prison, then the time such disability continues shall not be deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defense, but such action may be commenced within the period of seven years after such disability shall cease, etc.

The legislature having provided, by sections 1287 to 1293, inclusive, a system of statutory limitations in case of actions founded on legal title, it then proceeds, in article III, section 1294, to declare provisions applicable to sections other than real actions. The first clause of section 1294 reads as follows:

Limitations: "Actions other than those for the recovery of real property can only be commenced as follows," and declares the period of the statute in seven various actions other than to recover real property, and among the seven is the four-year and the three-year clauses. The provisions of the statute are so clear and plain that we deem the citation of authorities unnecessary. The contention of the plaintiffs that the seven years' limitation in section 1288 applies—that is, a court of equity can apply it, by way of analogy, if the

seven years had run before the suit commenced—would render the four-year clause and three-year clause applicable to action in equity for relief entirely nugatory and inoperative. In short, it is very plain that this bill in equity treating the defendants as trustees to compel them to convey the legal title cannot be tortured into an action for the recovery of real property, based upon the seisin or possession of the plaintiffs, their ancestors, predecessors, or grantors. This is clearly shown in the case of Branch *vs.* Cole, 18th Fla., 368, where the court declares in first syllabus as follows:

"A suit in equity claiming dower and mesne profits is not an action to recover real property, based upon the seisin or possession of the plaintiff," etc.

The court, in its opinion on page 375, considered section 2 of the act of 1872, which in its language is in legal effect the same as sections of Revised Statutes numbers 1287 and 1288, and, if a bill in equity to set aside dower and recover profits which is to determine the legal title to property is not an action to recover real property, certainly this bill to compel a conveyance of the title to real property and the recovery of profits is not an action for the recovery of real property.

Demurrer.

That the defense of the statute of limitations can be taken by demurrer where the facts showing the bar appear in the bill cannot be questioned (13th vol. Pl. & Pr., pp. 201, 206, and 101 U. S., 567).

Also "where plaintiffs claim disability to avoid statutory limitations, they must be shown in the bill" (15th vol. Pl. & Pr., pp. 257, 258, and notes.)

Paragraph 1.

The next point argued on the demurrer was that the settlement of Robert J. Hackley in 1823 and 1824, being admitted for the purpose of the argument, did not confer upon him any right or claim to pre-empt the land or any part thereof for the reason that his settlement, occupancy, and cultivation was not only without authority of law, but was in direct violation of the acts of Congress in force in the State of Florida at that time, viz., the act of March 3, 1807, which provides as follows: "That if any person or persons shall, after the passing of this act, take possession of or make settlement on any lands conceded or secured to the United States by any treaty made with a foreign nation or by a cession from any State to the United States, which lands shall not have been previously sold, conceded or leased by the United States, or the claim to which lands of such person or persons shall not have been previously recognized and affirmed by the United States; or if any person or persons shall cause such lands to be thus occupied, taken possession of, or settled, or shall survey or attempt to survey, or cause to be surveyed any such lands; or designate any boundaries thereon by marking trees or otherwise until thereunto duly authorized by law, such offender shall violate all his or their title, right and claim, if any he or they have, of whatsoever nature or kind the same may be, to the lands aforesaid which he or they shall have taken possession of or settled, or which he or they shall have surveyed or attempted to survey, or caused to be surveyed or the boundaries thereof he or they shall have designated or caused to be designated by marking trees or otherwise."

If the statement of the complainant's bill is true and R. J. Hackley was ejected from the said land by the military in 1824, any settlement he may have made, any improvements he may have erected, any cultivation he may have done,

any act of possession he may have comm itted, was contrary to law, and no right could have been initiated by virtue of any such illegal acts. This proposition standing alone would defeat the right of the Hackley heirs to recover in this case.

Paragraph 2.

The next proposition which we will present in this case is that the provisions of the act of 1826 could not apply to the land in question for the reason that at the time of its passage, and in fact for two years prior to the date of its passage, the land had been appropriated legally by the War Department of the United States for a military encampment or cantonment, and that, having been segregated from the public domain, it was no longer subject to pre-emption, it having been legally appropriated to the use of the army for public purposes. After the segregation of a body of public land from the general land of the United States and its appropriation to a specific purpose legally, no subsequent law, or proclamation, or sale, can be considered to embrace it or to operate upon it, even though no reservation of it has been made. In the case of Wilcox *vs.* Jackson, 13th Peters, page 498, it is held as follows:

"The President acts in many cases through the heads of departments, and the Secretary of War having directed a section of land to be reserved for military purposes, the court presumes it to have been done by direction of the President, and held it to be by law his act. Whenever a tract of land has been appropriated to public use, it is separated from the mass of the public domain, and subsequent laws of sale are not considered to embrace it, though they do not in terms except it."

In his decision on this case, Mr. Hoke Smith, the Secretary of the Interior, decided as one of the facts of the controversy as follows: "The tract now known as Fort Brooke

military reservation was occupied under the direction of the Secretary of War two years before the passage of the act upon which the claim of the Hackley heirs is predicated" (Record, page 48).

This statement of fact, taken together with the decision of the Supreme Court of the United States in the Wilcox *vs.* Jackson case, cited above, renders the conclusion inevitable that after the passage of the act of 1826 no right of pre-emption by virtue of its terms could exist as to lands prior to its passage appropriated for public purposes by the Secretary of War and severed from the mass of public lands subject to the operation of the law. We call the court's attention especially to the language of the act of 1826, namely:

"That every person, or the legal representative of any person, who being either the head of a family, or 21 years of age, did on or before the first day of January in the year one thousand eight hundred and twenty-five (1825), actually inhabit and cultivate a tract of land situate in the Territory of Florida (which tract is not rightfully claimed by any other person)." We contend, and it seems to us that the conclusion is inevitable, that the tract of land claimed in this controversy was at the time of the passage of the act of 1826 rightfully claimed by the Secretary of War as a military cantonment, and was by the language of the act itself exempt from the operation of the pre-emption law and no rights could be obtained in it by any individual under that law. The court will notice particularly that the language is "which tract is not rightfully claimed by any other person;" not "was" at the time of the settlement claimed by any other person, but at the time of the passage of the act not rightfully claimed by any other person; and we insist that the possession of the military authorities prior to the passage of the act of 1826 was the possession and the rightful possession of some other person who claimed the land for the purpose declared to be legal by the decision of the Secretary of the Interior, and which made it impossible for the

law to confer upon Mr. Hackley any right to pre-empt the same. This position was stated most clearly by the Secretary of the Interior in his opinion, and seems to us to be clearly the law of the case.

Bearing upon this question, we quote the language of Mr. Justice Field in the Yosemite Valley case, 15th Wallace, page 77. Speaking of the power of Congress to grant public lands for specific public purposes, notwithstanding the pre-emption rights of settlers upon such lands, the court said: "If such be the effect of mere settlement with a view to pre-emption, upon the power of Congress to grant the lands occupied to another party, it must operate equally to deprive Congress of the power to reserve such lands from sale for public uses of the United States, though needed for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or for any other of the numerous public purposes for which property is used by the Government. It would require very clear language in the acts of Congress before any intention thus to place the public lands of the United States beyond its control by the mere settlement of a party with a declared intention to purchase, could be attributed to its legislation." And this decision was rendered in a case which will be hereafter more fully referred to, in which it was declared "that under the pre-emption laws a party by a mere settlement upon the lands of the United States with a declared intention to obtain title to the same, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party."

Our next contention is that, under the facts set out in the bill of complaint and the exhibits thereto attached, even if we conceded, for the sake of argument only, that, at the time of the passage of the act of 1826, Hackley had obtained the right to pre-emption by virtue of his settlement prior to the occupation of the land by the War Department, even then he was divested of his rights by reason of the fact that he

utterly failed to comply with the conditions and regulations requisite to complete his pre-emption and purchase the land.

The second section of the act of 1813, April 22, contains the conditions, terms, restrictions, provisions, and requirements which are referred to in the act of February 5, 1826, viz: "That every person claiming a preference in becoming the purchaser of a tract of land by virtue of this act, shall make known his claim by delivering a notice in writing to the register of the land office for the district in which the land may lie, wherein he shall particularly designate the quarter section he claims, which notice the register shall file in his office on receiving 25 cents from the person delivering the same, and in every case where it shall appear to the satisfaction of the register and receiver of public monies of the land office, that any person who has delivered his notice of claim is entitled to preference in becoming the purchaser of a quarter section of land, such person so entitled shall have the right to enter the same with the register of the land office, reproducing his receipt from the receiver of public monies for at least one-twentieth part of the purchase-money, as in the case of other public lands sold at private sale; provided that all lands to be sold under this act shall be entered with the register at least two weeks before the time of the commencement of the public sales in the district wherein the land lies; and every person having the right of preference in becoming the purchaser of a tract of land who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited and the land by him claimed shall be offered at public sale with the other public lands in the district to which it belongs."

The bill of complaint shows that Robert J. Hackley in 1823 inhabited and cultivated a certain tract of land situate on the east side of the Hillsborough river, and that the land is now known as lots numbers eight, nine, and ten of section

24, township 29 south of range 18 east, in Hillsborough county, etc., and that in the month of February, 1824, he was evicted from said lands and possession of the same taken by Col. George M. Brooke as a cantonment or fort for the United States troops.

The complainant, by his bill, further shows that the land office was established in St. Augustine, Florida, in which district or jurisdiction the land in controversy was located, in 1828, and yet that no act of his claiming the right to pre-empt the land upon which he claimed settlement was made until some time in the year 1835, the land at that time being yet unsurveyed by the Government. The bill shows further that the cantonment or reservation by the War Department at that time was about 16 miles square, and that the notice filed by him in 1835 complied with none of the provisions and requirements of section 2 of the act of 1813, inasmuch as that law required that the notice in writing to be delivered to the register of the land office and filed there should particularly designate the "quarter section" the applicant claimed the right to pre-empt, which right, as decided by the courts, was nothing more than a priority of privilege to purchase the particular land described whenever the same should be surveyed, platted, and offered for sale under the laws of the United States. It is not even claimed by the bill of the complainants that any subdivisions or quarter section of land was at any time described by Mr. Hackley, as required by the law of 1813.

The complainants in the court below further alleged that in 1843 Hackley caused to be secured from the register of the land office in St. Augustine, Florida, a certified copy of the evidence formerly filed in that office in support of his claim to the right of pre-emption in the purchase of the land, and filed the same with the register of the land office at Newnansville, Florida, and we call the attention of the court to this notice, which nowhere describes the land except in

the following language: "The tract of land known as Cantonment Brooke, Bay of Tampa."

The bill sets out that Robert J. Hackley died in 1845, and we respectfully submit to the court that at that date he had done nothing which would give him the right of pre-emption under the act of 1826 and the conditions imposed by the act of 1813, already quoted.

Under part II of the brief of appellants in this case, under the heading of "The technical grounds of demurrer" and the second division thereof, the learned counsel for appellants take the position that the bill in this case specifically sets up with sufficient certainty the compliance by R. J. Hackley with all the requirements of law under the act of 1826 and the subsequent act under which he claims the right of pre emption, and that, therefore, a demurrer to this part of the bill is what they call a "speaking demurrer," and will not lie.

Calling attention again to the bill itself, as found in the record, on page 7, we beg to state that it does not specifically allege the compliance with the requirements of the act aforesaid except by implication, and the only allegation of compliance (which, if left alone, would be totally insufficient) is found in the affirmation in the bill: "Your complainants show that the said Robert J. Hackley and his representatives, your complainants, as aforesaid, have complied with all of the terms, restrictions, conditions, provisions and regulations of the said acts of April 22nd, 1826, and February 5th, 1813, *so far as they are applicable to this case.*" (Italics ours.)

Therefore we respectfully submit that the allegation is not positive and certain, and will be sufficient only in case the further statements as to what was done (which statements of fact are made a part of the bill) are sufficient to show a compliance with the requirements of these laws, and as the allegations of the bill as to what was actually done are, in our opinion, totally insufficient, then a demurrer will lie to this specification of the bill of complaint.

There is another reason, however, to which the attention of the court, as far as we have been able to notice and examine the briefs of the complainants, has not been called at all, and that is that the act of 1813, section 2, required that the pre-emption certificate of the lands to be sold to people who had delivered the proper notice under the act of 1826, describing the particular quarter section claimed, was to be entered with the register at least two weeks before the time of the commencement of the public sales in the "district" in which the land lies, and it is nowhere set up in the complainants' bill, nor is it a fact from the record, that the land in controversy was ever reported to the register and receiver by its description two weeks before the time of the commencement of public sales in the district wherein the land lay, at that time the St. Augustine district. As a matter of fact, public sales of the land in this district were first made in 1828, and were made from time to time by the officers of the Government, as required by law, and we contend that the failure of Mr. Hackley to make known his claim by delivering a notice in writing two weeks before the sales of the public lands in the district in which the land claimed by him was situated absolutely forfeited his right under the latter clause of section 2 of the act of 1813, which says: "Every person having the right of preference in becoming the purchaser of a tract of land, who shall fail so to make his entry with the register within the time prescribed, his right shall be forfeited and the land claimed by him shall be offered at public sale with the other public lands in the district to which it belongs." The reason why the land was not offered for public sale with the other public lands in the district to which it belonged is apparent; that prior to the act of 1826 it had been legally appropriated by the War Department for a cantonment, and therefore it was withdrawn from the mass of public lands of the United States, and was no more subject to sale than it was subject to the right of pre-emption at the time of the pas-

sage of that act; but for the purpose of the argument, if it had never been reserved, if it had still remained subject to the right of pre-emption, and the military cantonment of Fort Brooke had never been established on it, Mr. Hackley during his lifetime had not complied with the clear requirements of the act of 1826, coupled with the act of 1813, and had by his failure forfeited every right to pre-emption, and at the time of his death had no rights of preference in the purchase of this particular land. If Mr. Hackley had no vested interest by virtue of his settlement, then his heirs and representatives had nothing whatever upon which to base their claim of right to pre-emption.

The right of Congress to withdraw public lands, leaving no vested right in a mere settler prior to his completion of his right to an actual pre-emption of the land and the purchase of it, is decided most clearly and fully in the case of Frisbie *vs.* Whitney, 9th Wallace, page 187. In this case the court decided, in a very elaborate opinion by Mr. Justice Miller, that the mere occupation and improvement of the public lands with a view to pre-emption do not confer a vested right in the lands so occupied. The court decides, further, that the power of Congress over public lands is conferred by the Constitution, and can only be restrained by the courts in cases where the land has ceased to be Government property by reason of a right vested in some person or corporation; that such a vested right under the pre-emption laws is only obtained when the purchase-money has been paid and the receipt of the proper land officer has been given to the purchaser; that, until this is done, it is within the legal and constitutional competency of Congress to withdraw the land from entry or sale, even though this may defeat the imperfect right of the settler.

In the Yosemite Valley case, 15th Wallace, page 78, heretofore referred to on another branch of the argument, Mr. Justice Field quotes the case of Frisbie *vs.* Whitney and very clearly distinguishes both cases from that of Lytle against

the State of Arkansas, depended upon by the attorneys for the complainants in this case, as well as in that. In his opinion, after stating positively that the opinion of the Supreme Court in the case of Frisbie *vs.* Whitney was well considered, and unanimously the opinion of the court, Mr. Justice Field, in speaking of the case of Lytle against the State of Arkansas, states as follows: "The case of Lytle against the State of Arkansas is confessedly the strongest case which counsel can cite in support of the anomalous views advanced by him. It is manifest from the statement we have made of the facts in that case that neither the case itself nor the language used in the opinion of the court, when considered in connection with the facts, give the slightest countenance to those views, but that the decision of the court and the doctrines expressed in the opinion are entirely in harmony with the principles announced in Frisbie *vs.* Whitney. The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition by the settler of a legal right to the land occupied by him as against the owner, the United States, and the acquisition by him of a legal right as against other parties to be preferred in its purchase, when the United States have determined to sell. It seems to us little less than absurd to say that a settler or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition."

Referring to the facts in the above case, we call to the attention of the court that this is a case directly in point, where the land had been granted after the settlement by the claimant, and where the settlement by the claimant had been made and admitted after the passage of the act allowing the right of pre-emption, and in this particular it is even much stronger

in the interest of the claimant than the case at bar, the grant to the State having been made after an admitted legal occupation by the claimant, Mr. Hutchins. No vested interest was ever permitted to a pre-emptor of land until after the return of the survey of the land, by virtue of which survey he could comply with the requirements of the statute and enter with the register and receiver a description of the specific piece of land which he claimed the right to purchase, as a prior right over other purchasers or claimants.

In the case of Rector *vs.* Ashley, 6th Wallace, page 142, Mr. Justice Miller delivered another opinion upon the same subject, in which he says on page 151: "The rights of the claimant are to be measured by the act of Congress, and not exclusively by what he may or may not be able to do, and if a sound construction of that act shows that he acquires no vested interest in the land until the officers of the Government have surveyed the land, until that survey is filed in the office of the recorder and approved by him, then so the claimant's rights are created by that statute they must be governed by its provisions, whether they be hard or lenient."

In the case of Hall against Russell, 11th Otto, page 303, Chief Justice Waite delivered the opinion of the court, and decided that the title to the sale does not vest in the settler until the conditions have been fully performed. The opinion in this case is very elaborate and decides positively that there is no vested interest until the requirements of the statute have been fully complied with.

The last case on this subject, and one which seems to cover the entire ground of the controversy, is the case of Buxton *et al. vs.* Traver *et al.*, 130th United States, page 232. In this case Mr. Justice Field reaffirmed the doctrine, which he said had long been established in this court, laid down in Frisbie *vs.* Whitney, and quotes the opinion of Mr. Justice Miller, as well as the opinion of the court, in the Yosemite Valley case, hereinbefore referred to.

It seems to us that this unbroken line of decisions establishes the law beyond the possibility of controversy; that under the facts in this case found by the Secretary of the Interior Robert J. Hackley, during his lifetime, obtained no vested interest by virtue of his settlement. The very elaborate argument and proof prepared by the learned attorneys for the complainant changes by not one whit the well-settled law that the mere settlement upon public lands by one who desires to obtain the prior right of purchase from the Government carries with it no vested right in the land settled upon, and the only way that the settler can obtain any such right is after the lands are surveyed (if the settlement has been made prior to a survey), and to strictly comply with the statutes of the United States in force at the time in order to complete the purchase of the land which he claims he has a right to purchase in preference to others, and it in no way affects the right of the United States to dispose of the land either by grant, by gift, or by reservation before such public sale is ever permitted to take place.

As to Vested Rights and Decisions.

The position contended for by the solicitors for the appellants, both in the court below and here, is that the decisions of the Supreme Court beginning with Rector *vs.* Ashley, in 6th Peters, are not applicable to and do not govern the case at bar, because they arose under the pre-emption law of 1841, and this law was the first general pre-emption act, and enunciated and instituted a new order of things in the policy of the United States in the disposition of public lands.

They boldly take the position that old methods ceased, new methods began, conditions precedent, which gave vested rights, gave way to the performance of conditions subsequent which must be performed, or no right to the settler accrued.

The first case cited from the Supreme Court decisions was that of Rector *vs.* Ashley, 6 Wall., 142, and arose not under the general pre-emption law of 1841, but was a construction of a special act passed in 1836.

Following this case is that of Frisbie *vs.* Whitney, 9 Wall., 187, in which the court again sustains the principle laid down in Rector *vs.* Ashley as to what is necessary in order to have a vested right in the public lands of the United States.

In the Yosemite Valley case decided in 1872, Mr. Justice Field reaffirms the law as laid down in Frisbie *vs.* Whitney, and does not stop there, but carefully distinguishes the case of Lytle *vs.* Arkansas.

In Buxton *et al. vs.* Traver *et al.*, 101 U. S., 232, the court again passed on the question of vested rights, and again reaffirmed and quoted the decisions in the two cases last herein referred to.

We now come to the question of the "New Era," spoken of in appellant's brief, beginning in 1841.

It is true that the act of 1841 extended and enlarged the privileges of pre-emptors. It made changes in the policy of the Government, in that it permitted aliens to declare their intention and secure land, and people who should in future comply with the law to become the beneficiaries of the richest and most generous Government in the world—the richest in wonderfully fertile soil, the most profligate in giving it away. That part of the act necessary to be considered reads as follows:

Act of Congress, 1841; 5th Statutes at Large, chapter 16.

> "SEC. 10. *And be it further enacted*, That from and after the passage of this act, every person being the head of a family, or widow, or single man, over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration of intention to become a citizen, as required by the naturalization laws, who since the first day of June, A. D.

> eighteen hundred and forty, has made or shall hereafter make a settlement in person on the public lands to which the Indian title had been at the time of such settlement extinguished, and which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal sub-divisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however, to the following limitations and exceptions."

This act did not confine its benefits to those who should, after the passage of it, make settlement, but, like all the acts passed under the "Old Era," recognized prior settlement and prior improvements. It made no new departure, except to induce new settlers to take up our lands and build up our prairies. Under the provisions of the act of 1841, every man who had prior to the date of its passage and subsequent to the first day of June, 1840, made settlement, or erected a dwelling, was entitled to the first right to buy, and occupied the same legal position with the same vested rights Hackley had under the law of 1826. If this is true, and the mere fact of prior settlement and cultivation under the law changed the position of the entryman from being the beneficiary to that of benefactor, that instead of having a privilege he owned a right—then the decisions of the Supreme Court already referred to by us must control the case, and all the voluminous argument and history of the land laws to show the dawning of a "New Era" in 1841 must fail. It is true that the act of 1841 applied only to surveyed lands, so also did the acts of 1826 and of 1830, although the words "surveyed land" did not appear in the acts. All pre-emption laws have applied to surveyed lands.

The first general pre-emption act was passed in 1830, May 29, chapter 208, and permitted settlers to pre-empt on certain conditions 160 acres of the public domain. Section 1 reads as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That every settler or occupant of the public lands, prior to the passage of this act, who is now in possession, and cultivated any part thereof in the year one thousand eight hundred and twenty-nine, shall be, and he is hereby, authorized to enter, with the register of the land office, for the district in which such lands may lie, by legal sub-divisions, any number of acres, not more than one hundred and sixty or a quarter section, to include his improvement, upon paying to the United States the then minimum price of said land; provided, however, that no entry or sale of any land shall be made, under the provisions of this act, which shall have been reserved for the use of the United States, or either of the several States, in which any of the public lands may be situated."

The court will note that the land was to be entered according to its legal subdivisions, and this implied a survey. If there is any doubt, however, it must be dispelled by reading the first section of the act of Congress, July 14, 1832, as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all the occupants and settlers upon the public lands of the United States, who are entitled to a pre-emption according to the provisions of the act of Congress, approved the twenty-ninth day of May, eighteen hundred and thirty, and who have not been, or shall not be, enabled to make proof and enter the same within the time limited in said act, in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the land has been reserved from sale on account of a disputed boundary between

any State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions, in every respect, as are prescribed in said act, within one year after the surveys are made, or the land attached to a land district, or the boundary line established; and, if the said lands shall be proclaimed for sale before the expiration of one year as aforesaid, then they shall be entered before the sale thereof."

And the act of March 2, 1833, which reads as follows:

"Chap. XCII.—An act to revive the act entitled, 'An act supplementary to the several laws for the sale of (the) public lands.'

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases in which persons were settlers or occupants of the public lands prior to the first day of May, one thousand eight hundred and thirty-two, and were authorized to enter under the provisions of the act, entitled, 'An act supplementary to the several laws for the sale of (the) public lands,' approved April fifth, one thousand eight hundred and thirty-two, and were prevented from making their entries, in consequence of the public surveys not having been made and returned, or where the land was not attached to any land district, or where the same has been reserved from sale in consequence of a disputed boundary between two States, or between a State and Territory, the said occupants shall be permitted to enter the said lands on the same conditions, in every respect, as were prescribed in said act, within one year after the surveys are made, or the land attached to a land district, or the boundary line established; and if the land shall be proclaimed for sale before the expiration of one year as aforesaid, then the said settlers or occupants shall be permitted to enter before the sale thereof."

The land in controversy was, as a matter of fact, relinquished by the Government on the 4th day of June, 1883, and restored to the public domain under the land laws in

force at that time, and became a part of the public domain, subject to the operation of such laws, and the map and plat of it was duly filed in 1883, March the 22d.

The only application which was ever made by the heirs or representatives of Hackley was made, as set out in the bill, by the administrator in 1887, on October the 14th. At this time the land in controversy had been surveyed, platted, and the plats filed in the land office at Gainesville, Florida, nearly four years. Section 2286 of the Revised Statutes, being part of the act of 1862, requires or required at that time, the same being in force, that, in regard to settlements which were authorized upon unsurveyed lands, the pre-emption claimant shall in all cases be required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement. If, then, the right to pre-empt accrued to Hackley by virtue of his settlement in 1823, and the lands upon which he settled were never surveyed until 1883, and his representatives had a right, never having abandoned or forfeited during his lifetime his right to pre-empt, to complete that pre-emption, they could only do so, we submit, by strictly following the methods in force at the time of the survey to perfect their title, and they should have within three months after the filing of the plat, in 1883, made their declaratory statement under section 2266, Revised Statutes; this they do not claim to have done. There seems to be no question raised in the bill as to the legality of the occupation of the lands in controversy, under the order of the Secretary of War, by General Brooke in 1824, nor does there seem to be any controversy as to the fact decided by the Secretary of the Interior that this military reservation was legally abandoned on the 4th day of June, 1883.

These facts being, for the purpose of the argument, admitted, then the land in controversy immediately became a part of the public domain, subject to be disposed of under

the law as it existed on March the 22d, 1883. The law in force at that time with reference to military reservations in Florida was the act of August 18, 1856, and this act provided "that all lands heretofore reserved for military purposes in the State of Florida, etc., shall be disposed of and sold in the same manner and under the same regulations as other public lands of the United States."

After the abandonment or relinquishment of the reservation by order of January 4, 1883, a private diagram of the subdivisions of the land in controversy was received and approved by the local officers at Gainesville, Florida, and the reservation of Fort Brooke no more existed, the lands being restored to the public domain by virtue of the act of 1856, just quoted. If this is true, as found by the Secretary of the Interior, Mr. Hoke Smith, then the act of 1884, providing for the disposition of useless military reservations, could have no application to the land in controversy, as there was no useless military reservation known as Fort Brooke to which it could be applied. Fort Brooke had been abandoned in 1883 and the land restored to the public domain under the law then in force. The act of 1884 could have and did have no effect upon it.

The courts of the United States have always held that, while the interpretation placed upon the public-land acts by the Secretaries of the Interior is not binding upon the courts as matters of law, the decisions by the Secretary are binding as to facts, and that his findings will not be reviewed by a court of equity.

U. S. *vs.* Murphy, 32 Fed., page 376.
Lee *vs.* Johnson, 116 U. S., page 48.
Scott *vs.* Lockey Inv. Co., 60 Fed., page 34.

It is true that, in some cases, the courts of the United States will intervene to correct mistakes of law made by officers of the Land Office, but the rule is that they will do so only when it is clear that these officers have, by a mistake

of law, given to one man the land which, on the undisputed facts, belongs to another. The rule goes further; in the language of Justice Miller, "This means, and it is a sound principle, that where there is a mixed question of law and fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

Marquez *vs.* Frisbie, 11 Otto, 477.

Counsel for the appellants devote considerable of their time and brief to the facts as found by the land officers (Appellants' Brief, p. 152 *et seq.*).

We submit that the findings of fact to be considered by this court are confined to the opinion of the Secretary of the Interior, by virtue of which the appellees obtained their title, not the findings of registers, receivers, and commissioners that have failed to be sustained. The decision of Secretary Smith, which is the only decision that this court can be asked to review, it being the opinion and decision in which the error of law is alleged to have injured the appellants, does not admit of any question. He says, and finds as a fact, as follows, on bottom of page 54 of this record: "The tract now known as the Fort Brooke military reservation was occupied, under the direction of the Secretary of War, two years before the passage of the act upon which the claim of the Hackley heirs is predicated." Is this a statement of law or of fact? If it is a mistake, is it a mistake of fact or of law? If it is a finding of facts, then the case of Wilcox *vs.* Jackson (13th Peters, 498) supplies the law applicable to it and settles the case in this court.

Even should it be proper in this connection to consider the opinion of Secretary Noble, from which the learned counsel for appellants quote in their brief, on page 154, the findings of fact therein contained are insufficient to show a compliance with the statutes, because Mr. Secretary Noble does not find as a fact that they complied with the require-

ments of the act of 1813 and the act of 1826, under which they claim, but, on the contrary, the bill itself alleges, in effect, their failure to comply with the requirements of these statutes and proceeds to make excuses for their failure so to comply.

The next question is the standing of the grantees of the defendants to whom the defendant Lizzie W. Carew and the other grantees by patent of the United States had sold and deeded lots after the grant of the United States and without any charge of fraud or collusion. It is true the bill sets up in a weak and unsatisfactory way that these grantees had some sort of notice of the rights of the complainants, but they do not set up sufficiently, and even if they had notice they would be *bona fide* purchasers, entitled to be dismissed with their purchases from this court, unless they were actual participants in a fraud, which is nowhere charged in complainants' bill.

The Secretary of the Interior on March 8, 1898, refused to enter suit on the part of the United States, and at the petition and request of various squatters on these lands for the cancellation of these patents, on the ground that much of the land had been conveyed to purchasers, and that these people, if they were not parties to the fraud, would be *bona fide* purchasers, innocent in the eyes of the Government, and their rights would not be affected by a setting aside of the patents.

Surely, the only notice that could have been given of the right of the Hackley heirs was the notice that had appeared throughout the entire record of this case from 1883 up to the time of the issuance of the patents. They had been represented in every forum by eminent legal counsel; their rights had been adjudicated by the highest officer of the Land Office at least twice, and the Government had decided that there was no law which gave them the right of preemption, and that, even were the law which they claimed the benefit of applicable, they had utterly failed to comply

with the terms and provisions of it. Mrs. Carew and the other grantees from the Government had an absolute, indefeasible title from the highest possible source, and any purchaser from them by deed was, as to all the parties to the controversy, without notice except that notice of record to which we have already referred—that notice which said to them in plain language that the rights of the Hackley heirs had been adjudicated by a court of competent jurisdiction, and the case had been decided against them.

If the allegations of the complainants' bill are correct as to the dates upon which the various defendants other than Mrs. Carew received from or through her conveyance to the various pieces of property for the parts of the land allotted to her by the final decision of the Secretary of the Interior, then it is immaterial for the purposes of this argument whether the consideration for these various deeds was *bona fide* or not, inasmuch as nobody but Mrs. Carew or her creditors could raise that question. The Hackley heirs are in no position to raise it, because, from the date of the final receipt from the register and receiver of the general land office in Florida to the date of the bringing of this suit in the circuit court of the southern district of Florida, to wit, from the — day of —— to the 31st day of December, 1900, every purchaser of any of this property from Lizzie W. Carew must have been, under the allegations of this bill, an innocent purchaser without notice, because no purchaser could be deemed to have notice of an erroneous construction of law by an officer with proper jurisdiction or of a trust which did not and could not appear of record and which can never exist until it exists by a decree of court under the proceeding in equity which was begun long subsequent to the date of their deeds.

The twelfth ground of demurrer is that there is no specific allegation of error or construction of law in complainants' bill, and that unless such allegation is specifically made the bill should be dismissed. It is true that the complainants set

up in their bill that they come into court to claim a construction of the laws of the United States, and upon this statement and a quotation of the land laws of the United States, which they desire to be construed, they pray the jurisdiction of this honorable court; but this is not enough; they must show on the face of their bill, first, that there was a distinct error of law, and, second, that by that error alone they were deprived of rights which a proper construction of the statute itself would give them. This they have not done.

EDWARD R. GUNBY,
H. BISBEE,
Solicitors for Appellees.